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Judicial Interpretations of Section 374a Civil Practice Act

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after the law day. Since an assignment does not lessen the obligations of the assignor, to be logical, he should continue to be held after assigning. The reasonableness of the time which has been granted would govern in each case. There is no analogy here to the rule of suretyship which releases the surety from his obligation when he has not assented to an extension of time;¹⁸ or to the principle of the law of mortgages which releases the grantee of real property from liability on the mortgage debt where an extension of time is given without his consent to his grantee who has assumed the obligation of the mortgage.¹⁹ Where an assignor of a contract to convey real property is held liable to perform within a reasonable time after assigning, no new obligations are thrust upon him. But to hold a surety liable after an extension of time would be, in effect, to bind him with an obligation to which he never assented. In the latter case, time is definitely of the essence; it is in fact controlling. In the case of the vendor of real property, the decree of the court of equity granting specific performance to one who has been in default on the law day proceeds of necessity on the theory that time is not of the essence.

THOMAS E. MCDADE.

JUDICIAL INTERPRETATIONS OF SECTION 374a CIVIL PRACTICE ACT.

The marked dissension which followed the recent decisions of two departments of the Appellate Division in interpreting the new Section 374a of the Civil Practice Act¹ may be attributed to a firm conviction on the part of many that the broad, beneficial effect intended by the Legislature in enacting this amendment to the statute was not carried out by the appellate courts in the view which they took towards the legislative intent as expressed by the wording of

¹⁸ *Drucker v. Rapp*, 67 N. Y. 464 (1876).

¹⁹ *Calvo v. Davies*, 73 N. Y. 211, 29 Amer. Rep. 130 (1878); *Union Stores v. Caswell*, 48 Kan. 689, 29 Pac. 1072, 16 L. R. A. 85 (1892).

¹ L. 1928, Ch. 532:

"ADMISSIBILITY OF CERTAIN WRITTEN RECORDS. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial Judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind."

the new law. In *Johnson v. Lutz*,² decided by the Appellate Division in the Second Department, and in *Needle v. N. Y. R. R. Co.*,³ in the First Department, situations were presented which were practically identical. In both cases it was attempted to introduce in evidence a policeman's report of the accident filed by him in the station house, it being urged that such evidence was admissible under the new amendment to the Civil Practice Act.⁴ In each it was held that such evidence was inadmissible because the report of the policeman was based on the statements made to him by others, alleged witnesses to the event, the policeman himself having been absent when the accident occurred.

In reversing the decision of the trial court which admitted the questionable evidence in *Needle v. N. Y. R. R. Co.*,⁵ the Court said:

"This section was enacted in order to do away with the archaic rules of procedure in relation to book entries. * * * It is to be noted, however, that in every case where the section applies, the fact must be found by the trial Judge that the entry 'was made in the regular course of any business.' In the case at bar, to show that this record is not admissible, it is only necessary to point out that the statements made to the policeman, upon which he based his report, were not made by any person in the regular course of any business, but, on the contrary, the report of the policeman was made upon the irresponsible gossip of bystanders. * * *"

However just the criticism of this view may be, the result reached by the Appellate Division has been upheld by the Court of Appeals which recently affirmed the decision in the *Johnson* case.⁶ Speaking for the unanimous court, Judge Hubbs said that in view of the history of the new legislation it was clear that it was never intended to apply to a situation like that presented in the case at bar.

The confusion regarding this statute centers about the provision that the lack of personal knowledge by the entrant or maker shall not affect admission. This apparently invites the conclusion that any report, though founded on pure hearsay, will be admissible in evidence. Applying such a construction to the facts of the *Johnson* case, it is indeed difficult to reconcile it with the statute. Concededly, it is the duty of a policeman to report all accidents which occur on his beat while he is on duty. He made the report in the regular course of *his* business at a time nearly contemporaneous with the event, seemingly, perhaps, all that was required to make the evidence

² 226 App. Div. 772, 234 N. Y. Supp. 328, *aff'd* 253 N. Y. 124 (1930).

³ 227 App. Div. 276, 237 N. Y. Supp. 547 (1st Dept. 1929).

⁴ *Supra* Note 1.

⁵ *Supra* Note 3.

⁶ *Supra* Note 2.

admissible. Further, the fact that it was not based upon *personal knowledge* should affect merely the weight of the evidence, and not its admissibility.

It will be profitable at this point for a clearer understanding of the purpose and scope of the new section,⁷ to consider the exigencies which gave rise to its adoption.

Introduced into the United States during the early part of the nineteenth century, at a time when self-made evidence was still regarded with suspicion, the book entry rule applied at first only to cases where the entrant was unavailable as a witness.⁸ Obviously, since the entries were substituted for the oral testimony of the witness, personal knowledge by the entrant was required. Later decisions modified the rule so as to regard these entries as independent evidence.⁹ The common law rule is clearly expressed in the leading case of *Mayor v. Second Avenue R. R.*¹⁰ In an action to recover for the amount of work performed and material used to make certain repairs, the plaintiff offered in evidence a time book and a written account of material kept by the head foreman. With respect to the time book the head foreman testified that the entries therein were correctly made by him upon the report to him of the facts by two gang foremen. The two gang foremen, in turn, testified they had never seen the entries, but that they were in charge of the laborers and that they had correctly reported to the head foremen each day the names of the men who worked and the number of hours which each man had worked. This chain of testimony was held sufficient foundation for the admission of the time book in evidence. With respect to the account of material, however, it appeared that a part of the items were furnished to the head foreman by one of the two gang foremen, who testified that he had no personal knowledge of the amount of stone which had been delivered, but that he had accepted the count of the carman and that his reports to the head foreman was based upon the reports of the carman to him. The Court of Appeals pointed out that, as the carman was not called to testify, the testimony of the head foreman and the gang foreman with respect to these items were mere hearsay and, therefore, this portion of the account of material was not strictly admissible.

The absurdity of this situation can readily be seen. It entailed a long, tedious, and practically impossible procedure of bringing into court all the clerks, salesmen, foremen, gangmen, laborers, truckmen, or whoever else contributed to the making of an entry, to verify it.

Under modern complex business conditions such procedure was intolerable. In the course of any ordinary business establishment employees changed; former employees could not be found; it was

⁷ *Supra* Note 1.

⁸ *Nichols v. Webb*, 8 Wheat. 432 (1832); *Welsh v. Barrett*, 15 Mass. 380 (1819).

⁹ *Payne v. Hodge*, 7 Hun 612 (1876).

¹⁰ 102 N. Y. 572, 7 N. E. 905 (1886).

difficult to ascertain by whom an entry was made; these and the consideration that the production of scores of employees to attend court deranged the work of the establishment and extended the litigation interminably, indicated that the need for reform was imperative. How imperative was this need may be gathered from the fact that the identical problem was considered by the Legal Research Committee operating under the Commonwealth Fund of 1920.¹¹ This committee, composed of leading authorities on the law of evidence, including such men as Chief Judge Cardozo, Dean Pound, Mr. Justice Stone, and Professor Wigmore, was requested to consider the whole subject of the law of evidence and to propose specific reforms. Assistants were employed to compile factual material with regard to the actual status of the law and rules of evidence in the various states, and to collect the opinions of those who had had actual experience with the working of the law of evidence in their respective jurisdictions.

Based on these investigations, which extended over a period of nearly five years, the committee rendered a report of prevailing conditions under the book entry rule, which is, in part, as follows:¹²

"The extent and complexity of modern business and contemporary methods of bookkeeping render necessary a re-examination of the rules of evidence governing the admissibility of books of account and entries in the course of business. The adjudicated cases alone, without any independent investigation into current systems of accounting, reveal the need of inducing the courts to give evidential credit to the books upon which the mercantile and industrial world relies in the conduct of business. * * *

"The law, then, if properly presented and understood, furnishes a method by which most business accounts can be proved; by a slight extension all could be proved. But at what an exorbitant cost! Examine the following description of the business system of handling a mixed order furnished by one of the leading manufacturers of linoleum; and then imagine the expense of proving the sale and delivery of goods at an agreed price to a customer who puts in issue every material allegation of the complaint."

Here follows the history of a transaction that might be duplicated in a thousand instances in the normal procedure of everyday business,—originating with the salesman on the road, passing to the branch office, then to the sales, credit, order, shipping, billing and bookkeeping departments.

¹¹ The Law of Evidence—Some Proposals for Its Reform (1927).

¹² *Ibid.*, Ch. 5: Proof of Business Transactions to Harmonize with Current Business Practice.

Correspondence with a large number of prominent manufacturers and wholesalers revealed that (1) the number of operations required to complete a transaction and the record of it varied from two or three to twenty-six and involved from two to one hundred and two persons. (2) It was frequently impossible later to identify the person who performed any particular part of the transaction. (3) The maker of the final entry usually had no personal knowledge of the transaction recorded. (4) Where mechanical bookkeeping systems were used, it was usually impossible to tell which member of the bookkeeping staff made any entry. A statute was suggested to remedy this situation, and was adopted as Section 374a of the Civil Practice Act.

It will thus be seen that it was not the purpose of this section to remove the effect of the hearsay rule in all instances of entries made in the regular course of any business, but to make an exception in the case of entries which are a part of commercial procedure, which because of their nature, possess an element of trustworthiness which justifies a rule which will "make the courts practical." Regarding this element of trustworthiness, it is interesting to note a discussion by Professor Wigmore:¹³

" * * * The situation is one where, even though a desire to state falsely may casually have subsisted, more powerful motives to accuracy overpower and supplant it. In the typical case of entries made systematically and habitually for the recording of a course of business dealings, experience of human nature indicates three distinct though related motives which operate to secure in the long run a sufficient degree of probable trustworthiness and make the statements fairly trustworthy:

1. The habit and system of making such a record with regularity calls for accuracy through the interest and purpose of the entrant; and the influence of habit may be relied on, by very inertia, to prevent casual inaccuracies and to counteract the possible temptation to misstatements.¹⁴

2. * * * misstatements cannot safely be made, if at all, except by a systematic and comprehensive plan of falsification. * * *

3. If in addition to this the entrant makes the record under a duty to an employer or other superior, there is the additional risk of censure and disgrace from the superior, in case of inaccuracies, a motive on the whole the most powerful and most palpable of the three. * * *

If the proper regard be had for the distinction between hearsay in the regular course of business, in which case the record is based on information received from one in the regular course of his busi-

¹³ 3 Wigmore, Evidence (1923), Sec. 1522.

¹⁴ Poole v. Vicas, 1 Bing. N. C. 649 (1835).

ness, and pure hearsay, in which case the record is based on information received from one disconnected from the business, it is obvious that the decision in *Johnson v. Lutz*¹⁵ represents an interpretation warranted by the terms of the statute and the underlying theory of circumstantial trustworthiness. It is submitted that, by limiting the provision that "the lack of personal knowledge by entrant or maker will not affect admissibility," with the requirement that "the entry must be made by one in the regular course of his business," the Court has in effect decreed that *personal knowledge must exist at the source of the transaction by one in the regular course of his business*, regardless of hearsay in the regular course of business at any other stage.¹⁶

While such a requirement will apply as well to a complicated system of entries, it is more obvious, due to the simplified procedure, in the case of a casual entry represented by a police blotter. Practically applied, it will simply be necessary to show the usual custom by which an entry was received, without producing the various persons who contributed to the making of it; and then, in order to show that it was not received in the regular course of business, it will be necessary for the objecting party to prove that the entry sought to be admitted was founded on pure hearsay, as distinguished from hearsay in the regular course of business.

DOROTHY SLAYTON.

THE VALIDITY OF A MORTGAGE CREATED AS A GIFT.

I

"There is perhaps no species of ownership known to law which is more complex or which has given rise to more diversity of opinions and even conflict in decisions than which sprung from the mortgage of Real Property."¹ Thus when we consider our problem, which involves but one phase of a single planet in the great universe of mortgage law, it becomes less strange, more feasible and even to be expected that it too should have become part of the chaos. Our inquiry is: Can one create a mortgage by way of gift in New York today? The aspect we shall consider is the situation as between the mortgagor and mortgagee. Enlightenment will best be attained by tracing the history of the mortgage instrument, which in itself has

¹⁵ *Supra* Note 2.

¹⁶ See opinion by Mr. Justice Byrne in *Kane v. City of New York* (Spec. Tr. Kings Co., N. Y. L. J., April 4, 1930).

¹ *Barrett v. Hinkly*, 124 Ill. 32, 14 N. E. 863 (1883).